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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1071

DEPARTMENT OF EMPLOYMENT AND BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT, APPELLANTS

v.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Revised Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (Jur. St. 18–29) enjoining appellants, on constitutional grounds, from collecting State unemployment taxes from the American National Red Cross ("Red Cross") and directing them to refund the taxes previously collected. The Colorado Employment Security Act requires employers,

including charitable organizations, to pay to the Colorado unemployment fund annual taxes measured by wages paid to employees. 4 Colorado Rev. Stat. Ann. (1963) 82-6-1. The district court found that the Red Cross is "an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act" and that "the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation" (Jur. St. 23).

ARGUMENT

The decision of the district court is plainly correct, and the questions presented are not sufficiently important to warrant plenary consideration by this Court.

1. Although this Court has never passed on the principal question presented by appellants—*i.e.*, whether the Red Cross is an instrumentality of the United States (Jur. St. 9–14)—there is no conflict of opinion among the few courts which have had occasion to consider the question. Moreover, repeated congressional and Presidential statements leave no doubt that the Red Cross is an arm of the federal government engaged in the performance of governmental functions. It, therefore, no less than national banks, is a tax-immune instrumentality of the United States.

The Red Cross, whose genesis goes back to the society founded in 1881 under the leadership of Clara Barton, now exists and is organized under the Act of January 5, 1905, c. 23, 33 Stat. 599, as amended

(36 U.S.C. 1, *et seq.*) The purposes of the Act, as appears from its preamble and its body, were to reincorporate the then-existing society, place it under government supervision, and establish the Red Cross as the official organization through which the government would discharge its obligations under the Red Cross Treaty of 1864.[1] After the Red Cross Treaty of 1929,[2] Section 3 First of the Act of 1905 was amended to embrace that treaty and "any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion." Act of May 8, 1947, c. 50, 61 Stat. 80. Thus the Red Cross is now also the organization through which the government discharges its obligations under the Geneva Convention for the Multilateral Protection of War Victims, August 12, 1949, 6 U.S. Treaties, 3114. Governmental supervision is achieved through the appointment by the President of the United States

[1] Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882), Treaty Series No. 377. This Treaty, *inter alia*, embodied the first international agreement to provide, through both military and civilian effort, care of wounded and sick combatants, irrespective of their nationality, and for conferring neutral and protected status on ambulances, hospitals, and personnel engaged in aiding and caring for the wounded and sick under the Red Cross emblem.

[2] Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, 47 Stat. 2074 (1932), Treaty Series No. 847. This Treaty revised and extended the Red Cross Treaty of 1864 and more specifically recognized the official and protected status of the voluntary aid (Red Cross) societies duly authorized by their governments to assist in carrying out the latter's treaty obligations.

of eight of the fifty members of the Board of Governors of the Red Cross, one of whom the President designates as the principal officer of the Red Cross and the other seven of whom are required to be "officials of departments and agencies of the Federal Government." Act of January 5, 1905, *supra,* as amended, Sec. 5, 36 U.S.C. 5. Other duties assigned to the Red Cross by the Act of 1905 are (1) to act "as a medium of communication between the people of the United States of America and their Armed Forces" (Sec. 3 Fourth, as amended by the Act of July 17, 1953, c. 222, 67 Stat. 178, sec. 4, 36 U.S.C. 3 Fourth) and (2) "to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the suffering caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same" (Sec. 3 Fifth, 36 U.S.C. 3 Fifth).

Congress has made government land and buildings available to the Red Cross for its national headquarters (Joint Resolution of February 7, 1930, c. 42, 46 Stat. 66; Joint Resolution of June 7, 1924, c. 369, 43 Stat. 665), and has authorized the Secretaries of the military departments to permit the Red Cross to erect or use government buildings on military installations for storage of supplies. 10 U.S.C. 2670. The

work of the Red Cross, however, depends on voluntary contributions of funds and services by private persons.

In short, the Red Cross performs important governmental functions and plays a significant role in fulfilling the duties entrusted to government departments and agencies. See *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485; Sturges, *The Legal Status of the Red Cross,* 56 Mich. L. Rev. 1, 30 (1957), and authorities cited therein. See also *Gradall* v. *United States,* 329 F. 2d 960, 964 (Ct. Cl.). Indeed, Congress frequently has recognized the role that the Red Cross plays in performing such functions.[3]

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[3] The 84th Congress declared in a concurrent resolution (H. Con. Res. 232, 70 Stat. B32):

> Whereas the obligations of this Government and its people under the Treaty of the Red Cross justified the establishment by the Congress of the American National Red Cross as the official agent of this Government to assist in the discharge of such obligations and to engage in other activities for the welfare and relief of the Armed Forces and the prevention and alleviation of human suffering re-

Appellants argue that the Red Cross is not a federal instrumentality because some of its operations are private in nature, it has an independent governing body, its employees are not federal employees, it re-

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sulting from disasters and emergencies at home and abroad; and

Whereas more than fifty years ago the Congress determined that the work of the American National Red Cross was of such importance to the Government and people of the United States and to the preservation of the dignity of all human beings that provision should be made for its operation under such grant of authority and such Government supervision as would impart official status and thus invite the confidence and support of all the people * * *

In recommending passage of the act which extended the authority of the President to accept the cooperation and assistance of the Red Cross in time of peace as well as in time of war (10 U.S.C. 2602), the Senate Armed Services Committee said (S. Rep. No. 460, 83d Cong., 1st Sess., p. 2):

The American National Red Cross, pursuant to its charter by the Congress of the United States, provides numerous welfare, communication, and recreational services to the Armed Forces of the United States which are not provided by the Armed Forces themselves. These services are concerned directly with individual members of the Armed Forces, and include direct communication with civilian members of service families, emergency loans, and the investigation of health and economic factors pertaining to dependents. The many highly desirable services contributing to the morale and comfort of patients in military hospitals include counseling, recreational activities, an arts and skills service, and other supplementary services. The American National Red Cross is also the authorized agency for communication with prisoners of war held by unfriendly governments. In all instances, when the need arises, the services of the American National Red Cross contribute greatly to the peace of mind and general welfare of the individuals concerned.

tains private counsel and holds property in its own name, and it is dependent upon private funds and endowments for its support (Jur. St. 13–14). Appellants' reliance on those indicia is misplaced, for each is equally present in the case of national banks, which this Court and the Congress have recognized as tax-immune federal instrumentalies ever since *McCulloch* v. *Maryland,* 4 Wheat. 316. See *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664.

The fact that the Red Cross has also been characterized as "independent" for purposes of its membership in the International Red Cross and in statements made by a former Red Cross chairman (Jur. St. 13) does not mean that it cannot be an instrumentality of the federal government for purposes of immunity from local taxation. While delegating governmental functions to the Red Cross, Congress said that it had determined that the Red Cross "should carry out its duties solely by means of the voluntary contributions of funds and services by the people" in order "to preserve and safeguard its impartial, nonpolitical character." H. Con. Res. 232, *supra.*[4]

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[4] Congress was alert to Red Cross' dependence on voluntary contributions, though it is a federal instrumentality when, in 1944, in revising the provisions dealing with taxes on transportation and communication services, it specifically exempted services furnished to "any corporation created by Act of Congress to act in matters of relief under the Treaty of Geneva of August 22, 1864." Sec. 3469, Internal Revenue Code of 1939, as amended by Sec. 307(a), Revenue Act of 1943, c. 63, 58 Stat. 21. Previously, such services furnished the Red Cross were regarded as exempt under the general exemption for services furnished any government agency. The specific exemptions have been continued in the more recent excise tax revisions. Internal Revenue Code of 1954, Secs. 4253(c), 4263(b) (26 U.S.C. 4253(c), 4263(b)).

Appellant's case is not advanced by their contention (Jur. St. 13) that the Red Cross "subjects itself to various state controls and other forms of state taxation." The contribution here in issue is a tax "on the exercise of the right to employ." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 508–509; *Cottrell* v. *Teets*, 139 Colo. 558, 561–562, 342 P. 2d 1016, 1018–1019. As in *McCulloch* v. *Maryland*, *supra*, it is "a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution." 4 Wheat, 316, 436–437. It is not to be confused with a tax on property or with other police regulations to which the Red Cross may constitutionally be subjected. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640; *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94. U.S. 94.

2. Appellants also argue that Congress has, by Sections 3305(b) and 3306(c)(6) of the Internal Revenue Code of 1954, as amended by the Social Security Amendments of 1960, 74 Stat. 924, Sec. 531, waived the constitutional immunity of the Red Cross from local unemployment taxes such as those prescribed by the Colorado Act (Jur. St. 14–17). The legislative history of the Social Security Amendments of 1960 makes it plain, however, that this was not Congress' intention.

Section 3305(b) of the Internal Revenue Code of 1954 provides, in pertinent part (emphasis added):

SEC. 3305. APPLICABILITY OF STATE LAW.

* * * * *

(b) *Federal Instrumentalities in General.*—The legislature of any State may require any instrumentality of the United States (*other than an instrumentality to which section 3306 (c)(6) applies*), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law * * *.

Section 3306(c), as amended in 1960, provides (emphasis added):

SEC. 3306. DEFINITIONS.

* * * * *

(c) *Employment.* —For purposes of this chapter, the term "employment" means any service * * * except—

* * * * *

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

* * * * *

(B) *exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section* (or the corresponding section of prior law) in granting such exemption;

* * * * *

The Red Cross is "exempt from the tax imposed by section 3301" because it is a charitable organiza-

tion within the definition provided by Section 3306 (c)(8), as amended, which exempts "service performed in the employ of a religious, charitable, educational, or other organization described in Section 501(c)(3) which is exempt from income tax under section 501(a)." I.T. 3258, 1939–1 Cum. Bull. 123; Publication No. 78, Internal Revenue Service (Rev. 12–64). The district court concluded that although subsection (8) does not cite Section 3301 by number, it "specifically refers to" such section within the meaning of subsection (6)(B) because its obvious purpose and effect is to exempt employment of the specified kind from the tax imposed by Section 3301 (Jur. St. 25–26).

This construction is clearly what Congress intended in enacting the 1960 amendments. Congressmen Mills and Ikard, who were the Chairman and a member of the House Ways and Means Committee, explained the purpose of Section 531, which amended Section 3306 (c)(6) to include the terms which are relevant here, as follows (106 Cong. Rec. 13827; emphasis added):

> Mr. IKARD. Mr. Chairman, I should like to clarify one particular section of the bill.
>
> Section 531 of the bill—pages 143–146 of H.R. 12580—extends coverage under the unemployment compensation program to employees of certain Federal instrumentalities. The extension will make subject to the Federal unemployment tax any Federal instrumentality which is neither wholly nor partially owned by the United States unless it is exempt from the tax by a specific provision of law. The same section authorizes the legislature of any State

to subject employment by such Federal instrumentalities to the State's approved unemployment compensation tax laws. Examples of the Federal instrumentalities thus to be covered are given on page 55 of the committee report on the bill—House Report No. 1799.

My purpose is to make it clear that there is no intention to extend coverage to an organization which is now exempt as a charitable corporation but which also is a Federal instrumentality neither wholly nor partially owned by the United States. The American Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. *Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation.*

Mr. MILLS. Mr. Chairman, will the gentleman yield?

Mr. IKARD. I yield to the gentleman.

Mr. MILLS. The gentleman has very clearly stated, may I say, the understanding that I have of the bill in this respect. Certainly his statement is a very clear reflection of what was intended as far as I am concerned.

3. Appellants' attack on the district court's jurisdiction rests on the erroneous premise that the basis for federal jurisdiction was diversity of citizenship (Jur. St. 11). Appellees were asserting a federal constitutional claim and seeking an injunction against the enforcement of the State's taxing statute. Consequently, the district court had jurisdiction under 28 U.S.C. 1331. Appellees were not required to exhaust the State's refund remedy because that procedure was not "plain, speedy and efficient."[6] See 28 U.S.C. 1341; *United States* v. *Bureau of Revenue of State of N.M.*, 291 F. 2d 677, 679 (C.A. 10); *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723, 726 (N.D. Ill.), on remand, 202 F. Supp. 757 (N.D. Ill.), affirmed, 371 U.S. 21; *United States* v. *Livingston*, 179 F. Supp. 9, 12 (E.D. S.Car.), affirmed, 364 U.S. 281. And since the imposition of the tax was asserted to be unconstitutional, appellees were not required to submit to the unlawful exaction and seek a later refund; they were entitled to have the collection of the tax enjoined. Finally, the contention that the Eleventh Amendment barred this suit is patently unsound. *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 304; *Sterling* v. *Constantin*, 287 U.S. 378, 393; *Ex parte Young*, 209 U.S. 123.

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[6] It should be noted that Colorado courts do not permit the recovery of interest on a refund (R. 75-76, 125). *Brannaman* v. *Richlow Manufacturing Co.*, 106 Colo. 317, 104 P. 2d 897.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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